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IN THE
COURT OF APPEALS OF INDIANA

DENNIS W. CONWELL and MAREDA A. BURNETT-CONWELL, Appellants-Defendants, vs. INTEGRA BANK N.A., Appellee-Plaintiff.	))))))))))	No. 87A01-0507-CV-326

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0308-CC-0244

September 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dennis W. Conwell and Mareda A. Burnett-Conwell ("the Conwells") appeal the trial court's judgment in favor of Integra Bank, N.A. ("the Bank"), on its complaint on promissory note and to foreclose mortgages. We affirm.

Issues

The Conwells raise three issues, which we consolidate and restate as follows:

I. Whether the Conwells waived their argument that the trial court did not apply Kentucky law to their affirmative defense; and

II. Whether the trial court's finding that the Conwells were in default of the promissory note was clearly erroneous.

Facts and Procedural History

The facts most favorable to the judgment follow. On June 3, 1999, the Conwells executed and delivered to the Bank a promissory note ("the Note") in the principal amount of $1,756,400.00 with interest thereon. The Note provided that the Conwells would be in default if, *inter alia*, (1) they failed to make any monthly payment when due or (2) they broke any promise to the Bank or failed to comply with or to perform when due any other term, obligation, covenant, or condition contained in the Note or any agreement related to the Note, or in any other agreement or loan the Conwells had with the Bank. Appellants' App. at 39, 47-48; Plaintiff's Ex. 1. The Note also contained a choice of law provision, which stated that the Note "shall be governed by and construed in accordance with the laws of the Commonwealth of Kentucky." Appellants' App. at 39, 47-48; Plaintiff's Ex. 1.

The Note was secured with two mortgages, granting the Bank a real estate mortgage on property in Newburgh, Indiana and another on property in Evansville, Indiana ("the

Mortgages"). The Mortgages required the Conwells to pay all real estate taxes before they became delinquent and to insure the real estate against loss by fire and other casualty for not less than the principal amount of the Note. Appellants' App. at 50, 55; Plaintiff's Ex. 2 & 3, para. 3. The Mortgages further provided that in the event of default in the payment of any installment of principal or interest due on the Note for a period of ninety days or in the event of failure to pay any taxes for a period of ninety days, the Bank "shall have the right to accelerate the unpaid principal and interest provided for, and then this mortgage and the [N]ote and all indebtedness secured hereby shall become due and payable at once and this mortgage may be foreclosed for the full amount of the indebtedness then unpaid without the necessity of demand or notice." Appellants' App. at 51, 55; Plaintiff's Ex. 2 and 3, para. 4.

During 2002, the Conwells were anywhere from twenty to thirty-two days delinquent on their monthly loan payments. Bank employee Alan White, the Conwells' loan officer during this time, had to call the Conwells nearly every month to obtain payment and explained to the Conwells the importance of "catching the loan up and staying inside 30 days." Tr. at 84. Specifically, White told the Conwells, "if [payment] was under 30 days, it was in my portfolio and I handled it. If it went beyond that, it went on higher level to where other people would be associated with it and essentially they would – and they're not going to let it get too late." *Id*. at 85.

In 2003, the Conwells' payment delinquency progressively worsened: the March payment was thirty-four days late, and the April payment was forty-five days late. Further, on May 10, 2003, the Conwells failed to pay the spring installments of real estate taxes due on the properties, and the real estate taxes became delinquent. On June 3, 2003, the

Conwells tendered a check for the May 15 loan payment, but that check was returned due to insufficient funds. As of June 15, 2003, the Conwells had failed to make the May 15 and June 15, 2003 payments due on the Note. On June 24, 2003, Bank officer Susan Chapman sent the Conwells a certified letter stating:

> Per our telephone conversation of today, payments are due for principal and interest due May 15, 2003 and June 15, 2003. Please deliver the May 15 payment no later than Friday, June 27 to my attention.
>
> Also, it has come to my attention that [the]insurance policy … covering the property carried through Indiana Farmers Mutual Insurance Group was cancelled for non-payment on December 4, 2002. Please forward a copy of the new policy or evidence of insurance to me by June 27, 2003.

Appellee's App. at 15; Plaintiff's Ex. 6.

As a result of the Conwells' delinquency of more than thirty days on the loan, the loan was transferred to Bank employee Beth Clark in July 2003. Tr. at 96. As of July 15, 2003, the Conwells had not made the payments due on the Note for May 15, June 15, and July 15, 2003. On July 17, 2003, Clark met with White, Dennis Conwell, and his son, Todd Conwell, to discuss the status of the loan. At that time, Clark was unaware that the check tendered for the May 15 payment had been returned due to insufficient funds and believed that the Conwells were behind only on the June 15 and July 15 payments. At the meeting, the payment delinquency and insurance cancellation were discussed. Further, the Bank learned that the Conwells had not paid the spring installments of the real estate taxes due on the mortgaged properties.

On July 18, 2003, Clark sent Dennis a letter that (1) explained that the Bank would force-place insurance coverage to protect the collateral and would forward a bill as soon as it was received and (2) asked Dennis to continue his efforts to obtain coverage from Volkman

Insurance and inform the Bank as soon as he obtained coverage so that the Bank could cancel the force-placed insurance. Appellee's App. at 12. Clark also informed Dennis that the delinquency issue needed to be resolved and asked him to reconsider borrowing against his wife's marketable securities or liquidating certain of her assets. Finally, Clark stated that if the Conwells obtained insurance and brought the loan current by making the June and July payments, she would approve at least two subsequent payments of an interest-only structure. Clark did not receive a response to this letter. On July 21, 2003, she sent a second letter requesting that the June 15, 2003 payment be made to the Bank on or before July 25, 2003. Clark was still unaware that the May 15 payment had not been made. On July 22, 2003, the Bank received the May 15, 2003 payment, sixty-seven days late.

On July 31, 2003, Donald Fuchs, the Bank's attorney, sent a letter to the Conwells informing them that because they had not made the June 15 and July 15 payments on the Note, the Conwells were in default, and to cure the default the Conwells were required to pay the June and July payments plus late charges and attorney's fees by August 8, 2003. *Id*. at 21. On August 6, 2003, the Bank received the June 15, 2003 payment, fifty-two days late. That was the last payment the Bank received from the Conwells. Thus, the Bank did not receive the remaining amount still due under the Note by the August 8, 2003 deadline.

On August 27, 2003, the Bank filed a complaint against the Conwells for breach of the Note. On November 10, 2003, the fall installments of real estate taxes were not paid and became delinquent. On February 24, 2004, Fuchs sent the Conwells a second letter, informing the Conwells that they had breached the Note and Mortgages by (1) failing to make payments due on the Note through February 15, 2004; (2) failing to provide the Bank

with proof of insurance; and (3) failing to pay the delinquent real estate taxes due on both properties. *Id*. at 23-24. The letter also informed the Conwells that they could cure their default by completing all of the following on or before March 25, 2004: (1) making all payments due under the Note; (2) paying all the real estate taxes due; (3) paying the premium for the force-placed insurance; (4) providing evidence that they had obtained an insurance policy; and (4) paying the Bank's attorney's fees incurred as a result of their breach. *Id*. The Conwells did not take any action, nor did they contact the Bank or Fuchs's office to dispute the Bank's position or propose an alternative course of action.

On March 25, 2004, the Bank filed an amended complaint adding foreclosure of the mortgages. On July 14, 2004, the Conwells filed their answer, asserting as one of their affirmative defenses that "[t]he Bank's claims are barred by the Bank's failure to exercise good faith and fair dealing." Appellants' App. at 61. On November 29, 2004, the Conwells filed a motion requesting findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52. A bench trial was held on November 30, 2004, January 7, 2005, and January 25, 2005. The Conwells and the Bank both filed proposed findings of fact and conclusions thereon. On June 16, 2005, a phone conference was set for June 20, 2005, but the record is unclear as to whether the conference was held. On June 24, 2005, the trial court issued its findings of facts, conclusions thereon, and judgment in favor of the Bank and ordering foreclosure of the Mortgages. The Conwells appeal. Additional facts will be provided as necessary.

Discussion and Decision

Standard of Review

The Conwells requested findings and conclusions under Indiana Trial Rule 52(A). Our standard of review in such cases is well settled:

> First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.

Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001) (citations omitted).

I. Affirmative Defense

In their answer, the Conwells raised the following affirmative defense: "The Bank's claims are barred by the Bank's failure to exercise good faith and fair dealing." Appellants' App. at 61. On appeal, the Conwells argue that the trial court should have applied Kentucky law with respect to the aforementioned affirmative defense.[1] They contend, the Bank does not dispute, and we agree that the Note clearly specifies that Kentucky law applies. The trial

[1] The Conwells mistakenly assert that because the Bank as plaintiff prevailed, they are appealing an adverse judgment. When a trial court rules against a defendant on an affirmative defense, the defendant appeals a negative judgment. *See DeKalb Chiropractic Ctr. v. Bio-Testing Innovation, Inc.*, 678 N.E.2d 412, 414 (Ind. Ct. App. 1997) (noting that where defendant appealed the trial court's ruling against it on its affirmative defense, it appealed from a negative judgment)*; Mominee v. King*, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994) ("Because Mominee had the burden of proof at trial on his affirmative defense, he appeals from a negative judgment."). When appealing from a negative judgment, the appellant must establish that the trial court's judgment is contrary to law. *N. Elec. Co. v. Torma*, 819 N.E.2d 417, 421 (Ind. Ct. App. 2004).

court's judgment refers to Kentucky law only once:

> 3. Once equity has assumed jurisdiction for one purpose it can retain jurisdiction for all purposes connected to the principal controversy. *Commonwealth of Kentucky Department for Human Resources v. Kentucky Products Inc.*, 616 S.W.2d 496, 500 (Ky. 1981), *Lewis v. Creech*, 176 S.W.2d 898, 899 (Ky.Ct.App. 1943). Indiana law is in accord with this principle as well, *Matter of Trust of Loeb*, 492 N.E.2d 40, 43 (Ind.Ct.App. 1986) (R'hrg.Den.)(Trans.Den.).

Appellants' App. at 28. It is otherwise unclear whether the trial court applied Indiana or Kentucky law in reaching any specific finding.

We note that where the rules of Indiana and Kentucky are the same, the trial court may properly apply the rules of Indiana. *See Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 291 (Ind. Ct. App. 1997) ("If the purposes and policies of two potential rules are the same, the forum should apply the forum law."), *trans. denied*. However, the Conwells argue that under Kentucky law, every contract has an implied duty of good faith and fair dealing. *In re Sallee*, 286 F.3d 878, 891 (6th Cir. 2002); *Forsythe v. BancBoston Mortgage Corp.*, 135 F.3d 1069, 1076 (6th Cir. 1997). Indiana law, on the other hand, does not impose a generalized duty of good faith and fair dealing on every contract. *Hispanic College Fund, Inc. v. Nat'l Collegiate Athletic Ass'n*, 826 N.E.2d 652, 658 (Ind. Ct. App. 2005). According to the Conwells, had the trial court applied Kentucky law rather than Indiana law, it would have found that the Bank had a duty to act in good faith and fair dealing and breached that duty.

Based on the record before us, the Conwells have not established that they presented to the trial court their argument that because Kentucky law recognizes that every contract has an implied duty of good faith and fair dealing and Indiana law does not, Kentucky law

applies to their affirmative defense.[2] "Failure to raise an issue before the trial court will result in waiver of that issue." *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002).[3] Moreover, the Conwells have failed to develop this argument with appropriate legal analysis. Indiana Appellate Rule 46(A)(8) requires arguments to "contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix[.]" The Conwells have failed to provide the appropriate Kentucky legal standard setting forth the conduct that constitutes a breach of the implied duty of good faith and fair dealing. We will not consider an assertion on appeal that does not include cogent argument supported by authority and references to the record as required by the rules. *Shepard v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). "If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties." *Id*. Accordingly, we conclude that the Conwells have waived this issue.[4]

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[2] The Conwells failed to include their proposed findings of fact and conclusions thereon in their appendix and have not directed us to any portion of the record that would establish that they presented this argument to the trial court.

[3] While the Bank does not argue that the Conwells waived this issue, we may find this type of waiver sua sponte. In *Bunch v. State*, 778 N.E.2d 1285, 1287 (Ind. 2002), our supreme court distinguished between "waiver as an affirmative defense" and "waiver by procedural default." The *Bunch* court clarified that because waiver as an affirmative defense is governed by Indiana Trial Rule 8(C)–which requires parties to plead waiver as an affirmative defense and, as a consequence, places the burden of proof at trial on the party asserting such affirmative defense–it is only applicable in circumstances where the party asserting waiver has argued such defense before the lower court. *Id*. By contrast, the latter form of waiver, which is more appropriately described as "procedural default" or "forfeiture," is a doctrine of judicial administration whereby appellate courts may sua sponte find an issue foreclosed under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue. *Id*.

[4] Furthermore, the Conwells misstated the trial court's finding on this issue. The Conwells assert that the trial court erred in not finding that the Bank had a duty of good faith and fair dealing. Appellants' Br. at 11. The trial court found as follows:

II. Default

The Conwells also challenge the trial court's finding that they defaulted on the Note. The trial court made the following relevant findings:

> 4. The Bank is entitled to a personal judgment against the [Conwells], jointly and severally, on Count I of the Amended Complaint for each of the three reasons set forth in paragraph 5 below. However, it is not necessary for the Court to conclude that all three reasons are supported by the evidence; it is sufficient if merely one reason is supported by the evidence.
>
> 5. The [Conwells] are in breach of the Promissory Note, entitling the Bank to a personal judgment against them on Count I of the Amended Complaint for the following three reasons:
>
> a. By failing to make the installment payments as required therein (*See* "Default" section of Promissory Note, Exhibit 1: "(a) Borrower fails to make any payment when due.").
>
> b. They are in default under both Mortgage 1 and Mortgage 2 for their failure to
>
> "keep all taxes, assessments and other liens and charges against said real estate paid before the same become delinquent." ("*See* Mortgage 1 and Mortgage 2, Exhibits 2 and 3, final paragraph pg. 2).
>
> By breaching the terms of Mortgage 1 and Mortgage 2, they are in default under the Promissory Note[.]
>
> (*See* "Default" section of Promissory Note, Exhibit 1: "(b) Borrower breaks any promise Borrower has made to Lender, or Borrower fails to comply with or to perform

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> 9. The [Conwells] had the burden of proof with regard to each of their affirmative defenses. While the [Conwells] attempted to introduce evidence in support of their affirmative defenses, including, but not limited to, those defenses pertaining to the Bank's actions on the [Conwells]' alleged attempts to sell the [mortgaged properties], and pertaining to the Bank's actions regarding the [Conwells]' alleged request that the interest rate be adjusted, the [Conwells] *did not meet their requisite burden of proof on their affirmative defenses*. There is insufficient evidence for the Court to find that the [Conwells] are entitled to any recoupment or other remedy to reduce the total sum due and owing to the Bank.

Appellants' App. at 31-32 (emphasis added). We note that the trial court refers to the Conwells' affirmative defenses, which would logically include their affirmative defense that the bank breached its duty of good faith and fair dealing. We conclude then that the trial court did not find that the Bank did not have a duty of good faith and fair dealing, but rather found that the Conwells did not produce sufficient evidence to establish that the Bank had breached the duty of good faith and fair dealing.

> when due any other term, obligation, covenant, or condition contained in this Note or any other agreement related to this Note, or in any other Agreement or loan Borrower has with Lender," and/or "(g) A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired").

c. They are in default under both Mortgage 1 and Mortgage 2 for their failure to

> "keep the improvements on the real estate insured against loss by fire and other casualty for not less than $1,756,400 and require a loss payable clause in the policy of insurance payable to the Mortgagee as its interest may appear." (*See* Mortgage 1 and Mortgage 2, Exhibits 2 and 3, final paragraph of pg. 2).

By breaching the terms of the Mortgage 1 and Mortgage 2, the [Conwells] are in default under the Promissory Note[.]

> (*See* "Default" section of Promissory Note, Exhibit 1: "(b) Borrower breaks any promise Borrower has made to Lender, or Borrower fails to comply with or to perform when due any other term, obligation, covenant, or condition contained in the Note or any other agreement related to this Note, or in any other Agreement of loan Borrower has with Lender," and/or "(g) A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired").

Appellants' App. at 28-29.

The Conwells assert that because the insurance and tax provisions were set forth in the Mortgages and not in the Note, the only justification for the Bank's initial complaint on promissory note was that the Conwells had not made the payments required by the terms of the Note. Appellants' Br. at 22. While it is not entirely clear, the Conwells are apparently asserting that (1) they were not in default when the Bank filed its initial complaint; (2) any

subsequent default of the Note and the Mortgages was created by the Bank's filing of the suit; and (3) the Bank cannot rely upon their subsequent default as a basis for recovery on a breach of contract claim.

Specifically, the Conwells argue that the trial court erred in finding they were in default because it erred in its construction of the Note and the Mortgages. Interpretation of the language in a contract is a question of law. *Art Country Squire, L.L.C. v. Inland Mortgage Corp.*, 745 N.E.2d 885, 889 (Ind. Ct. App. 2001); *3D Enter. Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005). We review questions of law de novo, and we therefore do not defer to the trial court's interpretation. *Art Country Squire*, 745 N.E.2d at 889; *3D Enter. Contracting Corp.*, 174 S.W.3d at 448. Our goal is to give effect to the intent of the parties as expressed within the four corners of the document. *Art Country Squire*, 745 N.E.2d at 889; *3D Enter. Contracting Corp.*, 174 S.W.3d at 448. Where the language of the contract is unambiguous and the intent of the parties is discernible from the written contract, this Court must give effect to the terms of the contract. *Stenger v. LLC Corp.*, 819 N.E.2d 480, 484 (Ind. Ct. App. 2004), *trans. denied*; *First Commonwealth Bank of Prestonburg v. West*, 55 S.W.3d 829, 836 (Ky. App. 2000). We may not construe unambiguous language to give it anything other than its clear, obvious meaning, and we may not add provisions to a contract that were not placed there by the parties. *Art Country Squire*, 745 N.E.2d at 889; *First Commonwealth Bank*, 55 S.W.3d at 836.

According to the Conwells, the Note does not include a provision that establishes "a specific time period in which non-payment ripens into a default." Appellants' Br. at 23. We

disagree. The Note specifically provides: "Borrower will be in default if any of the following happens: (a) Borrower fails to make any payment when due[.]" Appellants' App. at 39. The Conwells would have us ignore the plain meaning of this language because "when taken literally [it] would place the Borrower in default for being one day late on the payment" and that "would be manifestly unreasonable." Appellants' Br. at 22. However, the Conwells fail to explain, nor can we discern, how the literal meaning of the Note's default provision is manifestly unreasonable.

In addition, the Conwells state that "[u]nder the provisions of both Mortgages a non-payment must continue for a period of ninety (90) days for it to constitute an event of default." This is a mischaracterization of the relevant provisions in the Mortgages, both of which state: "*In the event of default in the payment of any installment of principal or interest due on said note for a period of 90 days* … ." Appellants' App. at 51, 55; Plaintiff's Ex. 2 & 3, para. 4 (emphasis added).

The record shows that when the Bank filed its initial suit on August 27, 2003, the Conwells were forty-four days behind on their July 15 payment and therefore were in default pursuant to the plain language of the Note. The Conwells' June installment due under the Note was fifty-two days late, the May installment was sixty-seven days late, the April installment was forty-five days late, and the March installment was thirty-four days late. Additionally, we note that the Conwells presented no evidence (other than Mr. Conwells' self-serving testimony that he would have paid the force-placed insurance premium, caught up the delinquent taxes and maintained the same payment pattern if the Bank hadn't filed suit) that the filing of the suit had any adverse effects on their financial condition. The

Conwells cannot blame the Bank for their failure to take any action to resolve their financial difficulties. Accordingly, we conclude that the trial court's finding that the Conwells were in default of the Note was not clearly erroneous.

Affirmed.

KIRSCH, C. J., and BAILEY, J., concur.